PP

v.

DATUK HJ WASLI MOHD SAID & OTHER APPEALS

FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ
ZULKEFLI MAKINUDIN CJ (MALAYA)
HASHIM YUSOFF FCJ
AHMAD MAAROP FCJ
JEFFREY TAN FCJ
[CRIMINAL APPEALS NO: 05-147-07-2012(W), 05-148-07-2012(S) & 05-149-07-2012(S)]
25 JULY 2013

CRIMINAL PROCEDURE: *Charges - Striking out - Application for - Whether respondent immune from corruption charges by reason of s. 132 Evidence Act 1950 - Respondent compelled to give incriminating evidence in another trial - Whether s. 132(2) intended to provide blanket protection from any criminal proceeding against respondent - Whether protection merely against arrest or prosecution or use of such evidence as proof against respondent in any criminal proceeding - Whether prosecution intended to adduce evidence given by respondent in another trial to support a pending prosecution case - Whether prosecution precluded from proceeding with pending trial on grounds respondent placed in highly prejudicial position - Whether contrary to principle of criminal justice - Whether there was a breach of protection given under s. 132*

EVIDENCE: *Witnesses - Duty to answer relevant questions - Compelled to give incriminating evidence in another trial - Whether respondent immune from corruption charges by reason of s. 132 Evidence Act 1950 - Whether s. 132(2) intended to provide blanket protection from any criminal proceeding against respondent - Whether protection merely against arrest or prosecution or use of such evidence as proof against respondent in any criminal proceeding - Whether prosecution intended to adduce evidence given by respondent in another trial to support a pending prosecution case - Whether prosecution precluded from proceeding with pending trial on grounds respondent placed in highly prejudicial position - Whether contrary to principle of criminal justice - Whether there was a breach of protection given under s. 132*

STATUTORY INTERPRETATION: *Interpretation of Acts - Intention of legislature - Evidence Act 1950, s. 132 - Whether should be given liberal and flexible interpretation - Whether s. 132(2) intended to provide blanket protection from any criminal proceeding against respondent on ground that he had been compelled to give evidence - Whether protection merely against arrest or prosecution or use of such evidence as proof against respondent in any criminal proceeding*

Charges were brought against the respondent at the Kuala Lumpur High Court for offences under s. 3(b)(ii) of the Prevention of Corruption Act 1961. The respondent filed an application to strike out the charges on the ground that the respondent was immune from these charges by reason of s. 132 of the Evidence Act 1950 ('Evidence Act'). The High Court dismissed the application. Aggrieved, the respondent appealed to the Court of Appeal against the decision of the High Court. In allowing the appeal, the Court of Appeal held that s. 132 of the Evidence Act should be construed in a liberal and flexible manner in consonant with its purpose or objective. The appellant thus appealed to the Federal Court. The main issue before this court was purely one of interpretation of s. 132 of the Evidence Act. The appellant submitted that the Court of Appeal had taken an erroneous view on the interpretation of s. 132(2) with regard to the evidence of the respondent at the trial of one Kasitah Gaddam, as opposed to the ongoing trial of the respondent at the High Court of Kuala Lumpur. The appellant submitted that the Court of Appeal failed to appreciate that when the respondent gave evidence at the trial of Kasitah Gaddam, and was compelled to give evidence of an incriminating nature, the High Court had specifically forewarned the respondent that whatever incriminating evidence adduced by the respondent at the trial of Kasitah Gaddam, as a witness, could not be used to establish the prosecution's case against the respondent in the present case. According to the appellant, the bar was only against the use of the evidence given by the respondent at the trial of Kasitah Gaddam as evidence against him in support of the prosecution's case and it could not be construed as a blanket immunity to the respondent from any prosecution. Thus, the appellant submitted that there would be no breach of the protection given under s. 132. The respondent, however, argued that by virtue of the respondent's incriminating evidence in the Kasitah Gaddam trial, the current charges in the Kuala Lumpur High Court proffered against the respondent ought to be struck out.

Held (allowing appeal)
Per Arifin Zakaria CJ delivering the judgment of the court:

(1) Section 132(1) of the Evidence Act provides that a witness shall not be excused from answering any question as to any relevant matter in issue, on the ground that the answer to such question will incriminate him. Section 132(2) of the Evidence Act protects a witness from arrest or prosecution in connection with or arising from the answer to a question put to him in court. Such answer could not be proved against him in any criminal proceeding, except a prosecution for giving false evidence by that answer. Hence, what s. 132(2) seeks to protect is the "answer" and this "answer" is specifically confined to "answer" to which the witness is by virtue of the said section compelled to give. (paras 14 & 15)

(2) On the plain reading of s. 132(2), the protection provided thereunder is merely against any arrest or prosecution or the use of such evidence as proof against him in any criminal proceeding. The prosecution in this case did not intend to adduce the evidence given by the respondent in the Kasitah Gaddam trial to support the prosecution case in the case pending before the Kuala Lumpur High Court. The prosecution rightly conceded that the incriminating evidence is inadmissible as proof against the respondent in the case now pending in the Kuala Lumpur High Court. That is the correct interpretation of the provision of s. 132 when read as a whole. Section 132(2) is not intended to provide a blanket protection from any criminal proceeding against the respondent on the ground that he had been compelled to give evidence under s. 132(1). (para 19)

(3) What is intended by the protection given by s. 132(2) is to preclude the prosecution from using the evidence forced out of the witness under s. 132(1) to incriminate himself. As such the protection could not be extended as to preclude the prosecution from proceeding with the charge against the witness on the ground that the witness will be placed in a predicament in putting up his defence should he be called to enter upon his defence. Such a proposition goes way beyond the immunity conferred by s. 132. In any event, such immunity could not be claimed and allowed before he takes

A the stand and before the question whether the evidence is incriminating or otherwise is considered by the court in light of the surrounding circumstances. (para 21)

(4) It is contrary to the principle of criminal justice to preclude
B the prosecution to proceed with the pending trial in the Kuala Lumpur High Court on the ground that the respondent would be placed in a highly prejudicial position because of the evidence he had given in the Kasitah Gaddam's trial. The prejudice referred to by the respondent's counsel is prejudice
C to the respondent's defence. It had nothing to do with the prosecution's case. Thus, the Court of Appeal had erred in adopting the so called "liberal and flexible" interpretation to s. 132. (paras 22 & 23)

D *[Case be remitted to the High Court for continued hearing].*

Bahasa Malaysia *Translation Of Headnotes*

Beberapa pertuduhan telah dibawa terhadap responden di Mahkamah Tinggi Kuala Lumpur untuk kesalahan di bawah
E s. 3(b)(ii) Akta Pencegahan Rasuah 1961. Responden telah memfailkan permohonan untuk membatalkan pertuduhan-pertuduhan tersebut atas alasan bahawa responden adalah imun dari pertuduhan-pertuduhan ini oleh sebab s. 132 Akta Keterangan 1950 ('Akta Keterangan'). Mahkamah Tinggi menolak permohonan
F itu. Tidak berpuas hati, responden merayu ke Mahkamah Rayuan terhadap keputusan Mahkamah Tinggi. Dalam membenarkan rayuan, Mahkamah Rayuan memutuskan bahawa s. 132 Akta Keterangan harus ditafsirkan dengan cara yang liberal dan fleksibel sejajar dengan tujuan dan objektifnya. Dengan itu, perayu merayu
G ke Mahkamah Persekutuan. Isu utama di hadapan mahkamah ini adalah atas pentafsiran s. 132 Akta Keterangan. Perayu menghujahkan bahawa Mahkamah Rayuan telah mengambil pandangan yang salah atas pentafsiran s. 132(2) berkenaan dengan keterangan responden di perbicaraan satu Kasitah Gaddam,
H berbanding dengan perbicaraan berterusan responden di Mahkamah Tinggi Kuala Lumpur. Perayu menghujahkan bahawa Mahkamah Rayuan telah gagal untuk mempertimbangkan bahawa apabila responden memberikan keterangan di perbicaraan Kasitah Gaddam, dan telah dipaksa untuk memberikan keterangan yang
I menunjukkan seseorang itu bersalah, Mahkamah Tinggi telah secara spesifik memberi amaran kepada responden bahawa apa-apa

keterangan yang membawa kepada kesalahan yang telah dikemukakan oleh responden di perbicaraan Kasitah Gaddam, sebagai saksi, tidak boleh digunakan untuk membuktikan kes pihak pendakwaan terhadap responden dalam kes semasa. Menurut perayu, pengehadan itu hanya terhadap penggunaan keterangan oleh responden di perbicaraan Kasitah Gaddam sebagai keterangan terhadapnya dalam sokongan kes pendakwaan dan ia tidak boleh ditafsirkan sebagai imuniti menyeluruh kepada responden daripada apa-apa pendakwaan. Oleh itu, perayu menghujahkan bahawa tiada pelanggaran kepada perlindungan yang diberi bawah s. 132. Responden pula menyatakan bahawa memandangkan dia telah memberikan keterangan yang menunjukkan seseorang itu salah di perbicaraan Kasitah Gaddam, pertuduhan-pertuduhan semasa di Mahkamah Tinggi Kuala Lumpur yang dibawa terhadap responden sepatutnya dibatalkan.

Diputuskan (membenarkan rayuan):
Oleh Arifin Zakaria KHN menyampaikan penghakiman mahkamah:

(1) Seksyen 132(1) Akta Keterangan menyatakan bahawa seorang saksi tidak boleh dikecualikan daripada menjawab apa-apa soalan berkenaan perkara dan isu yang relevan, atas alasan bahawa jawapan kepada soalan seperti itu akan membabitkannya. Seksyen 132(2) Akta Keterangan melindungi seorang saksi dari ditahan atau didakwa berhubung dengan dan berbangkit daripada jawapan kepada soalan yang dikemukakan kepadanya di mahkamah. Jawapan yang diberikan tidak boleh digunakan sebagai keterangan terhadapnya dalam mana-mana prosiding jenayah, kecuali pendakwaan memberikan keterangan palsu melalui jawapan itu. Oleh itu, apa yang ingin dilindungi oleh s. 132(2) adalah "jawapan" dan "jawapan" ini adalah khususnya terhad kepada "jawapan" yang diberikan saksi secara paksa menurut kuasa seksyen tersebut.

(2) Atas pembacaan s. 132(2), perlindungan yang diberikan adalah hanya terhadap tahanan atau dakwaan atau penggunaan keterangan yang diberikan sebagai bukti terhadapnya dalam mana-mana prosiding jenayah. Pihak pendakwaan dalam kes ini tidak mempunyai niat untuk mengemukakan keterangan yang diberikan oleh responden semasa perbicaraan Kasitah Gaddam untuk menyokong kes pendakwaan dalam kes yang belum selesai di hadapan Mahkamah Tinggi Kuala Lumpur. Pihak

pendakwaan dengan betul mengakui bahawa keterangan yang menunjukkan kesalahan tidak boleh diterima masuk sebagai bukti terhadap responden dalam kes yang masih belum selesai di Mahkamah Tinggi Kuala Lumpur. Itu adalah pentafsiran s. 132 yang betul apabila dibaca secara keseluruhannya. Seksyen 132(2) tidak bertujuan untuk menyediakan perlindungan menyeluruh daripada mana-mana prosiding jenayah terhadap responden atas alasan bahawa dia telah dipaksa memberikan keterangan bawah s. 132(1).

(3) Apa yang dimaksudkan oleh perlindungan yang diberikan oleh s. 132(2) adalah untuk menghalang pihak pendakwaan daripada menggunakan keterangan yang dipaksa keluar dari mulut saksi mengikut s. 132(1) untuk membabitkan dirinya. Oleh itu, perlindungan tidak boleh dilanjutkan untuk menghalang pihak pendakwaan daripada meneruskan dengan pertuduhan terhadap saksi atas alasan bahawa saksi akan berada dalam keadaan sukar untuk menegakkan pembelaannya sekiranya dia dipanggil untuk memasukkan pembelaannya. Proposisi sebegitu adalah melebihi imuniti yang diberikan oleh s. 132. Dalam apa jua keadaan, imuniti tidak boleh dituntut dan dibenarkan sebelum dia memasuki kandang saksi dan sebelum persoalan sama ada keterangan akan menunjukkan kepada kesalahan atau sebaliknya dipertimbangkan oleh mahkamah berdasarkan keadaan sekeliling.

(4) Ia bertentangan dengan prinsip keadilan jenayah untuk menghalang pendakwaan daripada meneruskan dengan perbicaraan yang belum diselesaikan di Mahkamah Tinggi Kuala Lumpur atas alasan bahawa responden akan diletakkan di satu kedudukan yang amat memudaratkan oleh sebab keterangan yang telah dia kemukakan di perbicaraan Kasitah Gaddam. Prejudis yang dirujuk oleh peguam responden adalah prejudis kepada pembelaan responden. Ia tiada kaitan dengan kes pendakwaan. Oleh itu, Mahkamah Rayuan telah terkhilaf dalam menerima pakai pendekatan yang "liberal dan fleksibel" berhubungan pentafsiran s. 132.

Case(s) referred to:

Jagathisan Muthoosamy v. PP [2013] 5 CLJ 36 CA ***(refd)***

Munniandy & Anor v. PP [1973] 1 LNS 92 FC ***(refd)***

People Ins Co v. Sandul AIR 1968 PH 101 ***(dist)***

The Attorney General of Hongkong v. Zauyah Wan Chik & 3 Others & Another Appeal [1995] 3 CLJ 35 CA ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 132(1), (2)
Prevention of Corruption Act 1961, s. 3(b)(ii)

For the prosecution - Kevin Morais (Joyce Blasius with him); DPPs
For the respondent - Muhammad Shafee Abdullah (Badrul Munir Mohd Bukhari, Mohamed Nazim Maduarin & Syed Ismat Syed Muhamad with him); M/s Shafee & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Arifin Zakaria CJ:

Introduction

[1] These are three appeals by the Public Prosecutor ('appellant') against the decisions of the Court of Appeal, registered as follows:

(i) Criminal Appeal No: 05-147-07-2012(w) (commenced at the Kuala Lumpur High Court);

(ii) Criminal Appeal No: 05-148-07-2012(s) (commenced at the Kota Kinabalu High Court); and

(iii) Criminal Appeal No: 05-149-07-2012(s) (commenced at the Kota Kinabalu Sessions Court).

[2] These appeals were initially scheduled to be heard together on 25 July 2013 as they involved the same facts. At the outset, learned counsel for the respondent raised a preliminary objection to the notices of appeal in respect of Criminal Appeal No: 05-148-07-2012(s) and Criminal Appeal No: 05-149-07-2012(s). The appellant conceded to the preliminary objection raised by learned counsel for the respondent and applied to withdraw both the appeals. These two appeals were accordingly struck out.

This court then proceeded to hear Criminal Appeal No: 05-147-07-2012(w). After hearing submissions by the parties, we allowed the appeal and now give the reasons for the same.

The Facts

[3] The facts giving rise to the appeal may be summarised as follows: two charges were brought against the respondent at the Kuala Lumpur High Court for offences under s. 3(b)(ii) of the Prevention of Corruption Act 1961. The respondent filed an application to strike out the two charges on the ground that the respondent is immune from these charges by reason of s. 132 of the Evidence Act 1950. On 7 October 2010, the learned High Court Judge dismissed the application. In his judgment, Mohamad Zabidin Mohd Diah J stated:

> Adalah jelas 'imuniti' yang dimaksudkan oleh Mahkamah dalam prosiding tersebut adalah imuniti seperti terkandung dalam Seksyen 132 Akta Keterangan iaitu OKT dilindungi dari diambil apa-apa tindakan berdasarkan apa-apa keterangan atau pengakuan yang mengaitkan dirinya yang diberi olehnya dalam prosiding terhadap Kasitah Gaddam kecuali tindakan berhubung memberi keterangan palsu dalam prosiding tersebut. Dengan kata yang mudah, apa yang diberitahu OKT dalam prosiding tersebut 'mati' di situ kecuali jika terdapat tindakan terhadapnya berhubung memberi keterangan palsu semasa memberi keterangan dalam kes tersebut. Ia tidak boleh dirujuk atau dibawa masuk dalam mana-mana prosiding lain termasuk prosiding hari ini. Itu sahaja 'imuniti' yang timbul. Ia tidak bermakna prosiding hari ini terhadap OKT tidak boleh diteruskan.

Proceedings In The Court Of Appeal

[4] Aggrieved, the respondent appealed to the Court of Appeal against the decision of the learned High Court Judge.

[5] On 4 July 2012, the Court of Appeal allowed the appeals by the respondent. In allowing the appeals, the Court of Appeal held as follows:

> In embarking upon an interpretation of Section 132 of the Evidence Act it is imperative that it be construed in a liberal and flexible manner in consonant with its purpose or objective. In so doing the Court should adopt an "all angles" approach. The Court must not only view Section 132 from the prosecution's angle but also from the angle of the witness or the category of person in which the appellant falls. To restrict the approach from the angle of the prosecution would negate the very protection which the section is intended for. To permit the prosecution to initiate/proceed with the prosecution against the witness who has

been given such protection would result in gross injustice as the witness would be placed in the highly prejudicial situation of compromising and/or destroying his defence or in the event he gave contrary testimony to the evidence given in the Kasitah Gaddam trial where he was accorded the section 132 protection he can be charged for perjury. The appellant in the circumstances would invariably be placed in the unenviable prejudicial position which negates the very objective of protection under Section 132 of the Evidence Act.

In this connection we are persuaded by the submission of Learned Counsel for the appellant, taking the above construction to play, the appellant would either be convicted for the 5 charges or convicted for perjury. The appellant would in his trial deny he bribed the officials of Sabah Land Development Board which denial is contrary to the answers he gave as prosecution's witness in the Kasitah Gaddam trial with the consequent attraction of a charge of perjury. Conversely if (for fear of the perjury prosecution) the appellant does not deny the evidence that he bribed the Sabah Land Development Board members then he will be convicted of all 5 charges.

Before concluding it is also appropriate to address the submission of the Learned Deputy Public Prosecutor on behalf of the respondent that the statutory protection of Section 132 of the Evidence Act does not preclude the prosecution of the appellant by other independent evidence. To our mind the submission is seriously flawed as not only does it go against the purpose or objective of Section 132 of the Evidence Act but its effect would be one of gross injustice. This is because the countenance of such a submission would result in no witness being immune from arrest and prosecution so long as the prosecution does not rely on the witness's answer to prove against him and negates the very protection that the section was intended for. Surely no witness would give favourable evidence for the prosecution if the Court does not give the requisite assurance that no harm would befall him even if he incriminates himself.

Proceedings In The Federal Court

[6] Upon a consideration of the appeal, it would appear that the main issue before us is purely one of interpretation of s. 132 of the Evidence Act 1950.

A **Submission Of The Appellant**

[7] The appellant submitted that the learned judges of the Court of Appeal had taken an erroneous view on the interpretation of s. 132(2), with regard to the evidence of the respondent at the B trial of Kasitah Gaddam, as opposed to the ongoing trial of the respondent at the High Court of Kuala Lumpur, where seven witnesses of the prosecution had already been called.

[8] The appellant submitted that the learned judges of the Court C of Appeal failed to appreciate that when the respondent gave evidence in the trial of Kasitah Gaddam in Case No. J1-46-6-2004, and was compelled to give evidence of an incriminating nature, the learned High Court Judge had specifically forewarned the respondent that whatever incriminating evidence adduced by the respondent at the trial of Kasitah Gaddam, as a witness, could D not be used to establish the prosecution's case against the respondent in the present case. The bar is only against the use of the evidence given by the respondent at the trial of Kasitah Gaddam as evidence against him in support of the prosecution case. It cannot be construed as a blanket immunity to the E respondent from any prosecution. The learned DPP argued that the prosecution would not be adducing the evidence given by the respondent in the Kasitah Gaddam trial as evidence in support of prosecution's case in the present case. In the circumstances, there would be no breach of the protection given under s. 132.

F

Submission Of The Respondent

[9] Learned counsel for the respondent submitted that by virtue of the respondent's incriminating evidence in the Kasitah G Gaddam's trial, which was given under compulsion pursuant to s. 132, the current charges in the Kuala Lumpur High Court proffered against the respondent ought to be struck out.

[10] Learned counsel for the respondent further contended that it was imperative that s. 132 ought to be construed in a liberal H and flexible manner in consonant with its purpose or objective. The court must not only view s. 132 from the prosecution's angle but also from the angle of the witness or the category of person in which the respondent falls. To permit the prosecution to initiate or proceed with the prosecution against the witness who had I been conferred such protection would result in gross injustice as

the witness would be placed in a highly prejudicial situation of compromising and/or destroying his defence or in the event he gave contrary testimony to the evidence given in the Kasitah Gaddam's trial, he is liable to be charged for perjury. The respondent in the circumstances would be placed in the prejudicial position which would negate the very objective of the protection under s. 132.

[11] Further, it was argued that s. 132 makes it clear that a witness is not precluded from answering any relevant question on the ground that "it will incriminate" or that it will expose the witness "to a penalty or forfeiture of any kind". In support, he referred this court to the case of *The Attorney General of Hong Kong v. Zauyah Wan Chik & 3 Others & Another Appeal* [1995] 3 CLJ 35 which held that:

> Section 132 of the Evidence Act 1950 has excluded the operation of the common law doctrine of privilege against self-incrimination. It follows therefore that the respondents are not excused, while giving evidence before the learned Judge, from declining to answer any relevant question asked of them. However, once it appears to the learned Judge that the answer to any particular question may result in one or more of the consequences described in s. 132(1), he must carry out the exercise set out in subsection (3) thereof. In this way neither the first, second nor the third respondent may be held criminally liable for the answers they provide, whether in examination in chief or under cross-examination.

[12] Learned counsel for the respondent further referred to the case of *Muniandy & Anor v. PP* [1973] 1 LNS 92; [1973] 1 MLJ 179. In delivering judgment of the court, Ong CJ (FCJ) held as follows:

> It is a shocking thing to say it, but counsel for the second appellant was asked by us whether, before making his application under section 154 of the Evidence Ordinance, he had not referred the learned trial judge to the provisions of section 132. How could any witness be expected to admit the commission by himself of a crime, unless he had been reassured by the judge that no harm would come to him from telling the truth, even if it incriminated himself? Counsel admitted to us his remissness, but, then, we considered it the plain duty of the learned trial judge to give this witness the necessary assurance, as laid down in section 132, which provides that a witness shall not be excused from

answering any question as to any relevant matter in issue, on the ground that the answer to such question will incriminate him. Then sub-section (3) reads:

> Before compelling a witness to answer a question the answer to which will incriminate him ... the court shall explain to the witness the purport of sub-section (2).

In this case the learned trial judge knew the question put to the witness would certainly incriminate him, should his answer be in the affirmative, because the age of the complainant made her willing participation to sexual intercourse not an available defence. Therefore the judge ought to have given, but did not give the witness the explanation he was entitled to by law. Consequently his evidence was placed before the jury in a form so as to demolish the defence completely. On this point alone, if nothing more, the appeal must succeed.

Rulings Of This Court

[13] As we have said earlier, the crux of the appeal is the interpretation of s. 132. For ease of reference, s. 132 is reproduced below:

> 132. (1) A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit, or in any civil or criminal proceedings, upon the ground that the answer to that question will criminate or may tend directly or indirectly to criminate, him, or that it will expose, or tend directly or indirectly to expose, the witness to a penalty or forfeiture of any kind, or that it will establish or tend to establish that he owes a debt or is otherwise subject to a civil suit at the instance of the Government of Malaysia or of any State or of any other person.
>
> (2) *No answer which a witness shall be compelled by the court to give shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by that answer.*
>
> (3) Before compelling a witness to answer a question the answer to which will criminate or may tend directly or indirectly to incriminate him the court shall explain to the witness the purport of sub-section (2). (emphasis added)

[14] What s. 132(1) provides is that a witness shall not be excused from answering any question as to any relevant matter in issue, on the ground that the answer to such question will incriminate him. Section 132(2) protects a witness from arrest or

prosecution in connection with or arising from the answer to question put to him in court. In other words, such answer cannot be proved against him in any criminal proceeding, except a prosecution for giving false evidence by that answer.

[15] Hence, what s. 132(2) seeks to protect is the "answer" and this "answer" is specifically confined to "answer" to which the witness is by virtue of the said section compelled to give.

[16] In the Kasitah Gaddam's trial, the purport of s. 132(2) was explained to him by the trial judge. This is apparent from the note of proceedings which reads:

> Dato' Wasli Mohd Said:
>
> > I do not want to say anything because it will incriminate me since I have cases; 5 corruption cases in Kota Kinabalu, 2 in Kuala Lumpur and about 85 charges under AMLA (Anti Money Laundering Act) in Kota Kinabalu.
>
> TPR: Section 132 Evidence Act applies.
>
> > Section 132(2) – if he is compelled to incriminate himself in this case, then these notes cannot be used against him in his other cases where he is being charged.
>
> Ct: "or be proved against him in any criminal proceeding".
>
> P/B Dato' Muhammad Shafee Abdullah:
>
> > Section 132 – The immunity is given by court. Immunity is only in criminal prosecution but not to a civil suit.
>
> Mah: Court has forewarned the witness that he is compelled to answer even if it incriminates him that whatever he said in this court, cannot be used to prove against him in the other cases he is already facing i.e. in Kota Kinabalu or Kuala Lumpur except for a prosecution for giving false evidence (perjury) by that answer. Court informed him of the immunity accorded to him under section 132 Evidence Act subsection 2, before compelling him to answer. Therefore court has already explained to witness the purport of section 132(2) before compelling him to answer.

[17] Thus, the learned judge had stated in clear terms the purport of s. 132(2) to the respondent. He stated that whatever the respondent said before the court cannot be used as proved against him in other cases currently pending. The learned judge had, at no time given the assurance that the respondent would

enjoy complete immunity from all charges which had any bearing on the evidence given by him. I am of the view that the learned judge cannot be faulted in his explanation to the respondent.

[18] Section 132 came for consideration of the Court of Appeal in *Jagathisan Muthoosamy v. PP* [2013] 5 CLJ 36; [2012] 5 MLJ 2012, where the Court of Appeal in a judgment delivered by Abdul Malik Ishak JCA observed:

> [39] The obvious effect of s. 132(1) of the Evidence Act 1950 is to reverse the privilege against self-incrimination as enshrined in the English common law. Lord Goddard LJ in *Blunt v. Park Lane Hotel, Limited, and Another* [1942] 2 KB 253 aptly said that the privilege against self-incrimination gives a witness the right to refuse to answer any question on the ground that it may expose him to any criminal charge, penalty or forfeiture. Put it another way, under the English common law a witness may refuse to answer questions which tend to criminate him.
>
> ...
>
> [44] Be that as it may, s. 132(2) of the Evidence Act 1950 envisages the situation when a witness is compelled by the court to answer a question, and the answer shall not subject the witness to any arrest or prosecution or be proved against the witness in any criminal proceeding except a prosecution for giving false evidence by the answer given by the witness thereto (*Rex v. GA Philips* [1936] MLJ Rep 106; *Tang Lew Keng v. Public Prosecutor* [1968] 2 MLJ 48*; Chean Siong Guat v. Public Prosecutor* [1969] 2 MLJ 63; and *Muniandy & Anor v. Public Prosecutor* [1973] 1 MLJ 179 (FC)).

[19] As stated by the Court of Appeal in *Jagathisan Muthoosamy v. PP* (*supra*), s. 132 is a departure from the rule against self-incrimination under English Common Law. However, s. 132(2) stipulates that no answer which a witness is compelled to give under s. 132(1) will subject him to any arrest, prosecution or be proved against him in any criminal proceedings, except a prosecution for giving false evidence by that answer. Hence, on the plain reading of s. 132(2) the protection provided thereunder is merely against any arrest or prosecution or the use of such evidence as proof against him in any criminal proceeding. We are not concerned here with the arrest or prosecution of the witness but with the use of such evidence in a criminal proceeding. As

submitted by learned DPP, the prosecution in this case does not intend to adduce the evidence given by the respondent in the Kasitah Gaddam trial to support the prosecution case in the case pending before the Kuala Lumpur High Court. The prosecution rightly conceded that the incriminating evidence is inadmissible as proof against the respondent in the case now pending in the Kuala Lumpur High Court. That, I think is the correct interpretation of the provision of s. 132 when read as whole. In my view, s. 132(2) is not intended to provide a blanket protection from any criminal proceeding against the respondent on the ground that he had been compelled to give evidence under s. 132(1).

[20] The complaint by the respondent is that in the event that the defence is called by the court in the present case then he would be placed in a predicament because of the evidence he had given in the Kasitah Gaddam trial. He contended that the evidence he had given in Kasitah Gaddam trial virtually destroys all possible defences that is open to him. The effect of this would be to negate the so called protection given to him under s. 132(2).

[21] To my mind what is intended by the protection given by s. 132(2) is to preclude the prosecution from using the evidence forced out of the witness under s. 132(1) to incriminate himself. As such the protection cannot be extended as to preclude the prosecution from proceeding with the charge against the witness on the ground that the witness will be placed in a predicament in putting up his defence should he be called to enter upon his defence. Such a proposition goes way beyond the immunity conferred by s. 132. In any event such immunity cannot be claimed and allowed before he takes his stand and before the question whether the evidence is incriminating or otherwise is considered by the court in the light of the surrounding circumstances (See *People Ins Co v. Sandul* AIR 1968 PH 101). As for the case of *Muniandy & Anor v. PP* (*supra*) cited to us by the defence, in my considered view, it has no application to the present case as in that case the judge failed to give the witness called by the defence the explanation under s. 132(2), and it was on that ground the Federal Court held that the evidence was placed before the jury in a form as to demolish the defence completely.

[22] On the above premise I am of the opinion that it is contrary to the principle of criminal justice to preclude the prosecution to proceed with the pending trial in the Kuala Lumpur High Court on the ground that the respondent would be placed in a highly prejudicial position because of the evidence he had given in the Kasitah Gaddam's trial. Let me make it clear that the prejudice referred to by the respondent's counsel is prejudice to the respondent's defence. It has nothing to do with prosecution case. At this stage of the proceeding I think it is highly speculative to have in the court's contemplation the respondent's likely defence should he be asked, at the end of the prosecution case, to enter upon his defence.

Conclusion

[23] For the above reasons I hold that the Court of Appeal had erred in adopting the so called "liberal and flexible" interpretation to s. 132. Accordingly, we allowed the appeal herein and set aside the order of the Court of Appeal and direct that the case be remitted to the High Court for continued hearing.

[24] My learned brothers Zulkefli Ahmad Makinudin (CJM), Ahmad Maarop (FCJ) and Jeffrey Tan (FCJ) had seen this judgment in draft and had expressed their agreement with it. My learned brother Hashim Yusoff (FCJ), had retired on the date that this draft was circulated to the panel members.